BRIEF IN SUPPORT OF PETITION FOR WRIT(S) OF CERTIORARI.

Opinions of the Courts Below.

The rulings of the District Court for the Southern District of California, Northern Division, sustaining the respondents Warren, Tracy, Brandon, Driver and Perkins' motion to dismiss filed March 28, 1938, and demurrer to first amended complaint *was without leave to amend as to said five (5) of respondents*, made by said District Court November 12, 1938, and NOT officially reported, but appears herein at end of "Minute Order" (R. 131, at 134, in No. 9158).

Same five (5) respondents, before Circuit Court moved about July 31, 1939, for dismissal of appeal as to them (R. 315) but such dismissal was denied (R. 318).

As to "Second Amended Complaint" District Court rulings (R. 281-283, in No. 9158) not officially reported, but judgments in record, No. 9158 at 286-287-288-289. Judgments each dated February 13, 1939. Judgments for certain respondents but the five (5) above mentioned filed no judgment yet as said in paragraph just above dismissal of appeal as to them not granted, in No. 9158.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, covering both No. 9158 and No. 9200, was filed January 6, 1940, and reported in:

Gilstrap et al. v. *Standard Oil Co. et al.*, 108 F. (2d) 736.

And joint petition for rehearing as to both cases denied herein, on March 13, 1940 (R. 331).

As to No. 9200, four judgments District Court not officially reported appear of March 20th, 1939, in record of No. 9200, at pages 387-388-389-390-391-392-3, with peti-

tioner, A. M. Gilstrap's exception to Standard Oil Co., of Ohio * * * cost bill, on special appearance (R. 393-394);

And March 23, and two March 24, 1939, judgments for certain respondents in record No. 9200 (R. 396-397-398-399) and March 31, 1939, judgments for certain respondents in record at pages 400-401. Certain other defendants-respondents here having again avoided presentation of any proposed judgments with any costs bills. None of said District Court judgments officially reported, but basis therefor by "The Court" (R. 377-387) March 13, 1939, replete with learned observation. His Honor observed:

"The complaint does not state a cause of action under the Anti-Trust Law * * *" (R. 380, in 9200).

About July 31, 1939, for dismissal of appeal as to them (R. 315), but such dismissal was denied (R. 318).

As to "Second Amended Complaint" District Court rulings (R. 281-283, in No. 9158) not officially reported, but judgments in record, No. 9158 at 286-287-288-289. Judgments each dated February 13, 1939. Judgments for certain respondents but the five (5) above mentioned filed no judgment yet as said in paragraph just above dismissal of appeal as to them not granted, in No. 9158.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, covering both No. 9158 and No. 9200, was filed January 6, 1924, and reported in:

Gilstrap et al. v. *Standard Oil Co. et al.*, 108 F. (2d) 736.

And, joint petition for rehearing as to both cases denied herein on March 13, 1940 (R. 448).

As to No. 9200, four judgments District Court not officially reported appear of March 20, 1939, in record of No. 9200, at pages 387-388-389-390-391-392-393, with petitioner, A. M. Gilstrap's exception to Standard Oil Co., of Ohio * * * cost bill, on special appearance (R. 393-394);

And March 23, and two March 24, 1939, judgments for certain respondents in record No. 9200 (R. 396-397-398-399) and March 31, 1939, judgments for certain respondents in record at pages 400-401. Certain other defendants-respondents here having again avoided presentation of any proposed judgments with any costs bills. None of said District Court judgments officially reported, but basis therefor by "The Court" (R. 377-387) March 13, 1939, replete with learned observation, His Honor observed: "The complaint does not state a cause of action under the anti-Trust Law * * *" (R. 380, in No. 9200). Obviously referring to first amended complaint in No. 9200.

III. Likewise, too, too narrow of application are: *Champlin Refining Co.* v. *Corporation Commissioner of Okla.*, 286 U. S. 210, 86 A. L. R. 403; and *Levering & Garrigus Co.* v. *Morrin*, 289 U. S. 103, 77 L. Ed. 1063. The Circuit Court erred in holding either of cases cited in their opinion, in 108 F. (2d) 736, were controlling.

IV. The "World wide" oil business, as factually explained and set forth in the three (3) tendered complaints, substantially do each involve interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

V. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but intrastate activities, whereby all * * * defendants, all acting in concert, to such end from year about 1924 to September 1937, "did engage thereby in said unlawful plan, agreement and scheme, and *that all of* the defendants did accuse,

charge, without basis therefor, and did state and allege, and did so give out to the world and did print, publish, distribute, and broadcast in said Districts, in all of northern California, and in all of southern California and elsewhere *outside of said State the statements*, stories, words of defamation, figures and charges of and concerning this plaintiff, as herein alleged, for the purposes and by all said defendants' intent to that end * * *'' (End paragraph VIII, R. 87, (f. 81) in No. 9200).

The said publications, about (alleged) fraudulent practices of ''* * * this plaintiff and members of his family * * *'' such publications ''* * * to blacken, discredit, besmirch, and libel this plaintiff and members of his family * * *'' were ''* * * all by said defendants broadcast as aforesaid concerning this plaintiff * * *'' (paragraph XII, R. 91-92-93, ff. 84-86); and, likewise, ''* * * to blacken, discredit, besmirch and libel this plaintiff * * *'' too, to further broadcast,—another defendant acting in concert (paragraph XV, R. 97-98-99-100, ff. 88-91); each such October 25, 1932, publications and articles in said newspapers, as well, as ''That each defendant and said Earl Warren in particular well knew, that Exhibit ''A'' annexed'' to First Amended Complaint (R. 133, *et seq.*), was but an option for and if oil lands proven; and NOT ever any violation by plaintiff of any laws of California. Exhibit ''A'', (R. 133, ff. 115-117) and, Exhibits ''B'' and ''B-1'' (R. 136-145, ff. 117-122), the latter being the THEN Attorney General Opinion, as to probable, if any, violation of Corporate Securities Act; of which there was none, as well known to said Earl Warren and all his then agents. (Paragraph XVI, R. 101, ff. 91-92-93) No. 9200, all of which intrastate activities of all respondents, in both No. 9158 and No. 9200 ''directly'' affected such interstate commerce.

ARGUMENT.

I. The Circuit Court of Appeals erred in holding that no substantial Federal question involved when in fact the main object of the conspiracy as set forth in the three (3) proposed complaints was to and did seek and gain control of intrastate activities, wholly destroyed petitioners' businesses, the intent to accomplish that purpose by restraint upon and actual restraint of interstate commerce through preventing petitioners progress (respondents), fearful of competition on a large scale crippling and most wholly destroying petitioners' business facilities and to destroy their ability to further ever again be able to obtain more or other oil leaseholds involving the interstate shipment of petitioners' many oil products (said circuit court indirectly holding): is not within the scope of the Sherman Act.

How-so-ever, Justice Haney says (*Stevens* v. *Foster & Kleiser Co.*, 109 F. (2d) at 777):

> "The complaint states a cause of action if it *alleged facts showing:*
>
> (1) Jurisdiction in the Court over the subject-matter;
>
> (2) Ownership of a right by Appellants;
>
> (3) Violation of such right(s) by Appellees; and
>
> (4) Damage or injury to appellants resulting from such violation.
>
> United States *v.* McIntire, 9 Cir., 101 F. (2d) 650, 653;
> United States *v.* Humbolt Lovelock Irr. Light & P. Co., 9 Cir., 97 F. (2d) 38, 42."

Petitioners further respectfully submit, that all these elements and too to the full, replete with facts, facts, and

facts, appeared in all tendered complaints in these Nos. 9158 and 9200.

Standard Oil Co. v. *U. S.*, 221 U. S. 1;
Eastern States Retail Lumber Dealers Asso. v. *U. S.*, 234 U. S. 600;
Buckeye Powder Co. v. *DuPont, etc., Co.*, 196 Fed. 514.

A. And, 9th Circuit, perhaps too, having "too narrowly applied the Sherman Anti-Trust Act" in *C. E. Stevens* v. *Foster & Kleiser Co.*, 109 F. (2d) at 769; No. 41, October Term, 1940. Certiorari granted May 6th, 1940.

It is important also to remember that it is not essential that either the petitioners' business which is damaged or the business of the respondents constitute interstate commerce:

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
>
> United Copper Securities Co. *v.* Amalgamated Copper Co., 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> Schechter *v.* United States, 295 U. S. 495, at 544.

B. The Court must consider pleaded facts as proved, and determine whether upon such assumed facts and the inferences they may reasonably support, a cause of action has been stated. (Heretofore, observed complaints verified, No. 9158 at R. 46, and 180; and, No. 9200, R. 133).

Noshey v. *American Auto Ins. Co.*, 68 F. (2d) 808.

A defendant is not allowed to move a dismissal upon denials of allegations of the plaintiff, or by new matter set up by the defendant. And:

> "A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed."
>
> Thompson *v.* Terminal Shares, 89 F. (2d) 652.

In that case it was said:

> "That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

A motion to dismiss must be heard upon and decided according to allegations of the complaint, as upon demurrer; *and defendant is not allowed by filing answer to move dismissal upon denials of allegations of plaintiff, or by new matter set up by defendant.*

Conway v. *White*, 292 Fed. 837 (C. C. A.).

Extraneous Matters Excluded.

The Court should disregard an erroneous ruling in another case, ('as my colleague Judge — said of the' No. 9158, R. 284) which has been appealed from another court.

> "Regardless of Rules: practice, pleadings, and modes of proceeding in civil cases shall conform as near as may be to that of courts of record of the State in which the Federal District Court is held."
>
> 28 U. S. C. A. Sec. 724.

Too, it would appear that the learned Judge District Court Fresno, might have been in error (not yet having

been discovered) * * * when, The Court, February 3rd, 1939, per Reporter's Transcript, No. 9158, R. 283, at 284, observed:

> "* * * although I doubt, in view of the admitted facts, that the wrong related to property *upon which oil had not yet been discovered*—however, (259) under any circumstances, a cause of action could be made under the Anti-Trust Law, * * *"

just below center of said page 284, in No. 9158; and, not vast hunting 'for needle in hay-stack' is necessary, in order to find:

> "And the plaintiffs further allege, that said drilling of said one well, and the records, reports, logs and *analyses did show and the defendants* well knew, that vast and valuable deposits of petroleum, natural gas and other hydrocarbon substances were so encountered * * * and petroleum consisted of the high grade shales, in vast bodies, over lain with sands and thin shales, in thicknesses of over 3000 feet, and that under the structures where the well was drilled the closures of the structures was perfect, and that four pay sands was encountered before the massive sand was encountered, which was at or near 6,000 feet deep, and that the entire massive sands could easily have been drilled into and thereby producing enormous quantities of an excellent paraffine oil, and great quantities of petroleum gases,"

so comprehensively alleged in No. 9158 at Paragraph XII (R. 147-148). Surely, plaintiffs-petitioners, injured, were after all "engaged in a business directly, or at least not remotely, affected by the conspiracy complained of." (Paragraph VI, and IX No. 9158, R. 138-139-140-141 to 144.) (Too, in No. 9200, R. 122-123 Par. XXVIII.)

United Copper Securities Co. v. *Amalgamated Copper Co.*, 232 Fed. 574, 577.

C. Too, it is quite possible or probable Circuit Court erred where District Court first erred.

Therefore, it is respectfully submitted that Circuit Court erred in holding no substantial Federal question involved, the respondents crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of all oil products mentioned in #1, of Questions Presented (Circuit Court in effect holding:) is not within the scope of the Sherman Act.

II. Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, September, 1936, is not controlling under different facts in instant case; and, Apex Hosiery Co. v. Leader (3 Cir. 90 F. (2d) 155, No. 638, October Term; certiorari granted, February 26, 1940, and C. E. Stevens Co. v. Foster & Kleiser Co., 109 F. (2d) 764, this Court No. 41, October Term, 1940; certiorari granted, May 6, 1940. * * *

A. Thereupon on some record herein and Circuit Court opinion it may appear, the *ultimate purpose or object* was to monopolize and apparently by some sort of means did, monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And, in each these cases, No. 9158 and No. 9200, the presence of *THIS INTENT WAS THE ELEMENT WHICH BROUGHT THESE* two cases within the scope of the Sherman Act; ever so contemplated by Petitioners when filing said No. 9158 and No. 9200, in District Court, Los Angeles.

B. The Circuit Court in holding, no substantial Federal question involved, has failed to distinguish between ultimate ulterior motive and purpose and respondents' intent to accomplish such purpose by a restraint upon interstate commerce forbidden by aforesaid Section 7 of Sherman Act

now known as 15 U. S. C. A., Sec. 15, herein quoted (at 27).

C. Needless to say, Standard Oil Company stores millions of barrels of oil and by-products at the present time for no other purpose than to use in its exclusive interstate marketing and trade. THESE EFFORTS TO ACCOMPLISH THE MONOPOLY BY RESTRAINING INTERSTATE COMMERCE WERE ENTIRELY SUCCESSFUL AS PLANNED BY THE CONSPIRATORS. Records, throughout No. 9158 and 9200.

No one should be "bewildered," however, as to Standard's complained of conduct, fully alleged as to its objects set forth in complaints herein.

D. Officials' Un-Official Unwarranted Acts Deplored.

Certain defendants, the five whose motion for dismissal was denied, do yet question the jurisdiction of the court in this conspiracy to injure the plaintiffs in person and property in violation of the Anti-Trust Act of 1890, which conspiracy HAD the object, as shown by all aforesaid in this closing—and purpose of restraining trade in interstate commerce, which appellees, Warren, Brandon, Driver, Perkins, and Tracy vastly "chimed in" with; and one Pearce—filing no Brief!

U. S. C. A., Title 15, Sec. 15, Act of 1914, Ch. 323. Sec. 4, 38 St. 731, Mont. Fed. Juris. and Proc. (3d ed.), p. 159, Sec. 202, U. S. Code, p. 352, provides, and includes the italicized provisions following, as to this conspiracy, performance of conspiracy, by two of these defendants-appellees at least, and many of the others actually, as well as all of them collectively:

> *"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to*

the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." (Italics ours.)
15 U. S. C. A., Sec. 15.

"The law gives the person aggrieved by the wrongful act a cause of action against the offending party" (*Id.*, Sec. 384, p. 619), though of course not as a separate cause of action if it be but a step in the general anti-trust violation in carrying out such a conspiracy. But one cause, against all in the conspiracy (50 C. J. 619).

Gonsouland v. *Rosomano*, 176 Fed. 421, 100 C. C. A. 97, apparently a leading case from the Fifth Circuit, states by syllibi:

"*An action for malicious abuse of process, civil or criminal, will lie though the process was lawfully issued on a valid judgment for a just cause and is valid and in form; the gravamen being the malicious abuse of the power conferred by the judgment or writ.*

"*The right of action for abuse of process is applicable to all kinds of abuse in the service of lawful process, not only against the officer, whose duty it is to act lawfully but against all who unite with him or direct him to inflict the injury.*" (Italics ours.)

There it appeared that notwithstanding the pendency of a suit for certain property the defendant brought two actions against the plaintiff, one for possession, and one for rent, and seized the plaintiff's stock and fixtures, obtained a judgment and writ of ejectment, evicted the plaintiff and his family, and seized all furniture, beds, bedding and wearing apparel, and destroyed one of the buildings, acting throughout in bad faith and maliciously. A judgment for the defendant was reversed. At page 486 the court said:

"The grievance for which redress is sought arises in consequence of subsequent acts—the illegal and

malicious abuse of the power conferred by the judgment and writ. The principle is general and has been enforced in a great variety of cases. It is applicable to all kinds of abuses in the service of lawful process. For every such wrong there is a remedy not only against the officer whose duty it is to act lawfully but against all who unite with him or direct him to inflict the injury."

In No. 9158 and No. 9200, the complaints, herein, primarily, are the entire question as to the legal sufficiency of the pleadings, re: right here, as to appellees' Warren, Brandon, Driver, Perkins, and Tracy, as well as then Deputy Corporation Commissioner Pearce, that malice was back of it all, as is alleged and verified; nor in any way contradicted.

Any argument or authority cited, by the appellees, intended to support their defense, immediately shows the following important distinctions to emphasize petitioners contentions; In drilling business, producing quantities of petroleum which are sent out of the State, to market greater quantities, the operator who purchases at a supply company in town a cable, an engine, a bit, and an oil tank, is not buying in interstate commerce, although they were all made in another State. But his product cannot be marketed in the State; and in fact is intended for and handled by a dealer outside the State, engaged exclusively in interstate commerce. It cannot be said that the cessation of operations of a $130,000 plant so engaged would not affect interstate commerce, injuriously. It cannot be said that it is the farmer or lessor in Yolo County who is alone injured if his lease operators of 40,000 acres of land bearing $30,000,000 worth of mineral, is closed down, put in jail to keep him out of business, and his plant wrecked and lands taken over by a monopoly, and all production prevented.

Upon the whole case as alleged, petitioners believe that the judgments and orders denying them the right to main-

tain an action against defendants who do not deny petitioners' losses and damage, nor the alleged causes thereof, were erroneous and that the judgments should be reversed.

III. The Circuit Court erred in holding either of cases cited in their opinion, in 108 F. (2d) 736, were controlling.

A. The Congressional power over commerce is governed by the Constitution, Art. I, Sec. 8. Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U. S. C. A. Par. 151 *et seq.*) the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U. S. C. A. Par. 601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U. S. C. A. Par. 511 to 511q). The *scope of each of these acts* has been passed upon by this Court.

National Labor Relations Board v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893;

National Labor Relations Board v. *Fainblatt*, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014;

Santa Cruz Fruit Pack. Co. v. *National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656, 82 L. Ed. 954;

United States v. *Rock Royal Co-Op.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446;

Curran v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

B. Too, in conclusion, petitioners insist that as part of (they, insist) the substantial Federal question Standard

Oil Company, an Ohio corporation, per #1, of Questions Presented Page 9, herein) it, from the State of Ohio, engaged in interstate commerce, and Motion to Quash Service of Summons being granted erroneously, their Default (R. 264, in No. 9158) is in order; too in No. 9200 (R. 312-313, 146-147).

IV. The 'World Wide' oil business, as factually explained and set forth in the three (3) tendered complaints, substantially do each involve interstate commerce. * * *

V. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but all the intrastate activities of all respondents as well.

A. The local transactions are caught up in the current of interstate commerce or their manipulations is capable of *directly affecting*, and burdening and obstructing the interstate commerce and thus they, the respondents here, become subject by their very wilful conduct to Federal regulations. This view is surely further expressed in the following cases:

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126;
Edwards v. *United States*, 91 F. (2d) 767;
United States v. *Wilshire*, 9 F. Supp. 396, aff. 77 F. (2d) 1022.

C. E. Stevens Co. v. *Foster & Kleiser Co.*, 109 F. (2d) 764; No. 41 this Court; Certiorari granted May 6th, 1940.

Conclusion.

The question whether respondents' restraint and obstruction of interstate commerce as alleged in the three (3) proposed Complaints constitute a violation of the Sherman

Act is one of national importance to business and as well the public interest.

Respectfully submitted,

A. M. GILSTRAP, and
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